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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANTE DANIL CARTER, Defendant and Appellant.	E072834 (Super.Ct.No. RIF1880136) OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis, Judge. Affirmed.

Matthew Barhoma for Defendant and Appellant.

Xavier Becerra and Rob Bonta, Attorneys General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In the early morning of November 11, 2016, the body of Eric Burniston (Burniston) was found on a remote street in the City of Corona with two gunshot wounds to the head. Investigators determined that Burniston's identity was linked to an extensive operation that used the personal identifying information of numerous individuals to obtain fraudulent loans from various financial institutions. While the operation involved the use of many names and identities, the only identity referenced more prevalently than Burniston's was that of defendant and appellant Dante Danil Carter.

Ultimately, defendant was convicted by a jury of first degree murder in connection with Burniston's death (Pen. Code,[1] § 187, subd. (a), count 1), as well as numerous other offenses involving the possession of firearms, identity theft, and financial crimes.[2] Additionally, the jury found that defendant intentionally killed Burniston by means of lying in wait (§ 190.2, subd. (a)(15)) and discharged a firearm causing death in the commission of the murder (§ 12022.53, subd. (d)). Defendant was sentenced to life imprisonment without the possibility of parole for the murder conviction and a

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[1] Undesignated statutory references are to the Penal Code.

[2] Specifically, in addition to murder, defendant was convicted of three counts of the unauthorized possession of a firearm (§ 29800, subd. (a)(1), counts 2-4); one count of the unauthorized possession of ammunition (§ 30305, subd. (a), count 5); four counts of grand theft from a financial institution (§ 487, subd. (a), counts 6-9); three counts of false personation (§ 530, counts 10-12); five counts of identity theft (§ 530.5, subd. (a), counts 13-17); two counts of possessing a falsified driver's license for the purpose of forgery (§ 470b, counts 18 & 19); and 10 counts of money laundering (§ 186.10, subd. (a), counts 20-29). The jury also found that defendant committed two or more theft-related felonies that involved taking more than $500,000. (§ 186.11, subd. (a)(2).)

consecutive indeterminate term of 25 years to life in state prison for the personal discharge of a firearm.[3]

On appeal, defendant raises claims of error related only to his murder conviction. Specifically, defendant claims (1) the prosecutor committed misconduct warranting reversal under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*) in questioning defendant during cross-examination; (2) the trial court erred in admitting evidence of prior, uncharged misconduct; (3) the trial court erred in excluding evidence of third party culpability; and (4) the cumulative impact of these errors requires reversal even if any individual error was not sufficiently prejudicial to independently warrant reversal.[4] We find no merit in defendant's arguments and affirm the judgment.

II. FACTS AND PROCEDURAL HISTORY

A. *Background, Facts, and Charges*

Defendant was involved in an extensive operation that involved obtaining the personal identifying information of numerous individuals; using that information to

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[3] Defendant was also sentenced to a consecutive determinate term of 21 years four months for the other charges.

[4] In his reply brief, defendant also claims that he was deprived of his right to defend himself when his original appellate counsel failed to provide unspecified "seminal and important aspects" of the transcripts of proceedings to substitute appellate counsel. However, "we cannot address matters that are outside of the record on appeal or issues that do not arise from the portion of the litigation underlying the appeal in question." (*Kinney v. Overton* (2007) 153 Cal.App.4th 482, 485; *People v. Croft* (1955) 134 Cal.App.2d 800, 804 ["No facts outside the record . . . can be considered on appeal" and "[s]tatements in briefs are not part of the record on appeal."].) Matters that involve examination of the conduct of appellate counsel clearly fall outside the scope of review on an appeal from the judgment.

create false documents; and using those false documents to open bank accounts, obtain loans, and open lines of credit with various financial institutions. The money obtained from these financial institutions would then be diverted to defendant through various accounts designed to mimic legitimate businesses, as well as various shell companies.

One of the ways defendant would obtain personal identifying information for use in his operation was to befriend young adults and offer them an opportunity to go into business with him. He would provide these individuals with small payments, while using their identities to obtain much larger sums of money. Burniston, along with two other young men, B.B. and B.C., were among the individuals who provided their personal identifying information to defendant.

In the early morning of November 11, 2016, Burniston's body was discovered on a street in the City of Corona. His body was discovered on the ground behind his parked vehicle with two gunshot wounds to the head. Ultimately, defendant was charged with first degree murder in connection with Burniston's death (§ 187, subd. (a), count 1), as well as numerous other charges related to the possession of firearms, identity theft, and various financial crimes.

B. *Relevant Evidence at Trial*[5]

1. Crime Scene Evidence

An investigator with the Riverside County Sheriff's Department testified that he was dispatched to the scene of a suspected murder in the early morning of November 11, 2016. He arrived at a location off of Temescal Canyon Road near the border of the City of Corona, which he described as rural and surrounded by open fields but located on the outskirts of a nearby residential community. At the scene, the investigator observed a body on the ground lying near the rear end of a parked, red vehicle. The body appeared to have two gunshot wounds to the head. Investigators located two nine-millimeter shell casings near the body and later identified the body as that of Burniston.

Two residents who lived in the residential community near the crime scene also testified at trial. The first resident testified that, on November 11, 2016, between the hours of 12:00 and 2:00 a.m., she left her home to pick up her son, following his return from a school field trip. As she left her residential community, she observed two vehicles parked in tandem on the side of the road, and she observed two men walking toward the rear of the second vehicle. She described the first vehicle as black or dark-colored and the second as red. After picking up her son, she took the same route home and, this time, she observed a body lying behind the red vehicle, a new vehicle that had stopped along

[5] As already noted, defendant was charged and convicted of numerous offenses related to firearm possession, identity theft, and financial crimes. However, because defendant has not alleged error with respect to these convictions on appeal, we summarize only the evidence relevant to the murder conviction.

the road, and the driver of that new vehicle attempting to render assistance. The dark vehicle she previously had observed was no longer present.

The second resident testified that on November 11, 2016, he was driving home from work when he noticed a red vehicle parked on the side of the road. After he drove past the vehicle, he observed a body lying on the ground behind the vehicle. The resident stopped his vehicle, exited, and walked over to see if any assistance was needed. When the individual did not seem to respond, the resident called 911. A few minutes later, the first resident who testified drove up and also stopped to render assistance.

2. Testimony of S.A.

S.A. testified she had been in a dating relationship with Burniston from 2011 until his death. Sometime in 2016, Burniston quit his regular jobs, but S.A. continued to see Burniston with money. She understood Burniston to be in a business relationship with defendant and that he would occasionally meet with defendant, but she did not know the nature of their business. S.A. testified that Burniston had shown her pictures of defendant and would also periodically show her text messages indicating when and where Burniston and defendant intended to meet.

On November 10, 2016, she received a text message from Burniston around 11:30 p.m., stating that he was going to meet with defendant in Corona. When she awoke the next morning, she saw that two additional text messages had been sent from Burniston's phone, stating he did not meet with defendant but, instead, went to have drinks with some friends. She felt uneasy because the messages used phrases and language that was atypical of Burniston. She tried calling Burniston several times, but

the calls went straight to his voicemail each time. Eventually, she went to look for Burniston at his grandparents' home, where she learned that Burniston had been killed.

3. Testimony of Forensic Accountant

A forensic accountant testified he had been retained by the Riverside County District Attorney's Office to conduct an analysis of voluminous financial records related to the case. Based on this analysis, he concluded that Burniston's identity was associated with numerous transactions in an extensive financial network, including a shell account used to distribute money and several large loans. A bank account in Burniston's name was used to facilitate the transfer of more money than any other accounts linked to this financial operation, and Burniston's identity was associated with approximately 40 percent of all transactions related to this operation. The only identity associated with the financial operation that was more prevalent than Burniston's was that of defendant.

4. Testimony of Anaheim Police Sergeant

A sergeant with the Anaheim Police Department testified that in the fall of 2016, he was tasked with investigating a claim of identity theft. The identity theft victim reported that a credit union account had been opened in her name without her permission and further provided a copy of a utility bill, which had been submitted to the credit union for payment. The bill bore the identity theft victim's name but defendant's residential address. Upon investigation, the sergeant learned that the account had been opened online, obtained the IP address[6] used to open the account, and discovered the IP address

[6] Internet protocol address.

was also associated with defendant's residence. The sergeant also discovered that numerous accounts and credit cards had been opened using the same IP address, and that defendant and Burniston were associated with many of these accounts. Finally, the sergeant discovered that the credit union had issued a check to the identity theft victim, the check had been mailed to defendant's residence, and the check had been cashed.

On October 27, 2016, the sergeant visited defendant at defendant's residence and conducted a recorded interview. The recorded interview was played for the jury. During the interview, defendant admitted he had some business relationship with the identity theft victim, which involved using her identity for financial transactions. When asked about the cashed check, defendant denied ever receiving such a check and claimed that he would have returned any such check to the victim, even if he had received one. When defendant claimed that he would not have been able to cash a check made out in the victim's name, the sergeant indicated that the check "was made out to a car company as well." Defendant adamantly claimed that any investigation regarding the check would not lead back to him.

The sergeant eventually learned the check had been deposited into a bank account held by Eric Burniston, "Doing Business As . . . Premier Motors." However, by the time the sergeant attempted to locate Burniston for an interview, Burniston had already been killed.

5. Testimony of B.C.

B.C. testified that he first met defendant in September 2016, shortly after B.C. turned 18 years of age, while attending an event for car enthusiasts. Defendant proposed

that B.C. consider becoming a "silent investor" in defendant's business. The precise nature of defendant's business was unclear to B.C., but B.C. understood that this involved defendant's use of B.C.'s personal information in order to obtain loans and, in exchange, B.C. would receive a monthly payment. At the time, B.C. thought it was a worthwhile venture because he had no money and had been evicted from his parents' home.

At some point, B.C. also began acting as a personal assistant to defendant and was paid $1,000 each month in exchange for running errands, picking up food, and driving defendant. B.C. testified that he met Burniston on one occasion after driving defendant to a meeting with Burniston. At the time, B.C. understood that defendant had some type of business relationship with Burniston and was delivering money to Burniston.

B.C. recalled that, in a prior conversation with defendant, defendant stated a female business associate had emptied one of their bank accounts and suggested he would pay $10,000 to have the woman killed. B.C. also recalled that, on a different occasion, defendant expressed a desire to kill Burniston. However, defendant did not disclose his motivation for wanting to kill Burniston, and B.C. did not ask out of fear defendant might become angry. According to B.C., defendant explained that he would contact B.C. to have B.C. drive defendant to kill Burniston. While defendant did not disclose where or how he intended to carry out the killing, B.C. knew defendant kept several firearms.

In the evening of November 10, 2016, defendant sent B.C. a text message, which signaled defendant's desire to carry out the killing that day.[7] In response, B.C. drove to defendant's home to meet defendant. As they left, defendant suggested that they take B.C.'s vehicle. B.C. did not see defendant carrying any weapons at the time they left his home. However, while driving to their destination, defendant pulled out a gun that had been hidden in defendant's clothing, said he was "going to test it to see if it worked," and fired a couple of shots out the window of the vehicle.

Defendant instructed B.C. to drive to a location off of Temescal Canyon Road and eventually instructed B.C. to park along the side of the road. Defendant then exited the vehicle while texting on a mobile phone, reentered the vehicle, and asked B.C. to repark the vehicle farther down the street. After about five minutes, Burniston arrived driving a red vehicle, and parked behind B.C.'s vehicle. Defendant exited B.C.'s vehicle, tapped himself as if to check to ensure he had his firearm, and walked to the rear of Burniston's vehicle. B.C. never exited the vehicle, but he watched through his rearview mirrors as Burniston exited the red vehicle and walked to meet defendant. B.C. recalled seeing Burniston smoke a cigarette while talking with defendant.

After some period of time, B.C. heard two gunshots; defendant quickly returned to B.C.'s vehicle, and B.C. drove away. Defendant was holding a firearm, as well as Burniston's mobile phone when he returned to B.C.'s vehicle. B.C. drove defendant

[7] B.C. exchanged a series of text messages with defendant in which they discussed going to a car meet. B.C. clarified that a car meet is an event in which car enthusiasts gather together to view each other's cars, but defendant had previously indicated this would be a signal that defendant intended to kill Burniston that day.

straight to defendant's home where defendant changed his clothing and handed the clothes he had been wearing to B.C. so that B.C. could dispose of them. B.C. testified that he originally intended to keep defendant's clothing as leverage in case B.C. was contacted by the police, but one of his friends eventually burned the clothes when B.C. revealed his involvement in Burniston's killing.

B.C. admitted he was granted immunity in exchange for his testimony against defendant. He admitted failing to disclose his involvement in Burniston's killing when he was initially contacted by the police. B.C. also admitted he did not tell the truth when the police initially conducted an interview with him. Nevertheless, B.C. stated he had confessed to a friend about his involvement in Burniston's killing the night it happened, which is what led the friend to help burn defendant's clothing.

On cross-examination, B.C. admitted that he had access to defendant's vehicles and home as part of his work for defendant. B.C. also admitted that defendant had previously shown him where some of defendant's firearms were stored and further admitted that he had access to these firearms. B.C. again admitted he lied to the police when he was initially contacted about Burniston as well as during a subsequent interview at the police station. B.C. also acknowledged that, despite being granted immunity for testifying at defendant's preliminary hearing, some of the testimony he gave at that time was inconsistent with his trial testimony. He admitted that he never approached the deputy district attorney to clarify inaccuracies in his preliminary hearing testimony prior to trial.

6. Evidence of Mobile Phone Communications

An investigator with the Riverside County District Attorney's Office testified that, following the discovery of Burniston's body, investigators contacted Burniston's family members, obtained Burniston's mobile phone number, and used that information to review call records related to Burniston's communications. Investigators noted the most recent phone numbers that had called Burniston's mobile phone, conducted a search in police databases for those phone numbers, and discovered that one of those numbers was associated with defendant.[8]

The investigator explained that the police also recovered a mobile phone, which was in defendant's possession at the time defendant was detained and subsequently arrested. The police extracted a series of text messages sent from Burniston's phone number to the mobile phone in defendant's possession. The text exchanges were presented to the jury. From September 28 through November 10, 2016, Burniston sent multiple text messages to defendant complaining about the fact that Burniston had not been paid as promised and about the mishandling of various accounts in Burniston's

[8] While the phone number was registered to B.B., defendant had previously filed a police report, representing that the phone number belonged to defendant. As a result, the number was linked to defendant in the police database.

name.[9] On November 10, Burniston sent a series of text messages to defendant's phone suggesting the two had a planned meeting later that evening.[10]

The investigator also testified that police had tracked cellular phone data for Burniston's phone number, the phone number associated with defendant, and a third prepaid mobile phone number. The cellular data showed the following sequence of events on the evening of November 10, into the morning of November 11, 2016: (1) defendant's phone was active at his residence before being turned off; (2) Burniston's phone approached the crime scene; (3) the prepaid mobile phone number was activated near the area of the crime scene; (4) Burniston's phone and the prepaid mobile phone number were active at the same time at the crime scene; (5) the prepaid mobile phone number was shut off; and (6) Burniston's phone traveled from the crime scene in the direction of defendant's residence before being turned off.

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[9] On September 28, 2016, Burniston sent a text message inquiring why he had received mail stating he owed monthly payments to a lender. On October 6, Burniston sent a text message that expressed concern over the fact he had not been paid as defendant had promised. For the next two weeks, Burniston sent multiple text messages that requested defendant make the promised payment. On October 21, Burniston sent a text message stating that a bank had closed one of Burniston's personal accounts. On October 29, Burniston sent a text message stating he had been contacted by two different lenders claiming he owed money. Finally, on the morning of November 10, Burniston sent a text message stating he had received a call regarding an overdue payment on a cash advance and a second text message stating he had represented to the vendor that payment would be made later that day.

[10] Specifically, at 6:27 p.m., on November 10, 2016, Burniston sent a text message stating: "Everything still on for tonight, Bro?" At 9:15 p.m., Burniston's phone made a call to defendant's phone and, at 9:31 p.m., Burniston's phone sent another text stating: "Let me know, Bro. I haven't heard from you in a while." At 12:06 a.m., on November 11, Burniston's mobile phone again sent a text stating: "Address, Bro."

A second investigator with the Riverside County District Attorney's Office testified that she analyzed records related to the prepaid mobile phone number. The prepaid mobile phone card associated with the number was activated in Burniston's name on November 9, 2016; was not used after November 11; and was used only to contact Burniston's known mobile phone number. She admitted the physical phones corresponding with Burniston's mobile phone and the prepaid mobile phone number were never recovered.

A retail store employee testified that she conducted an investigation into records related to the purchase of a prepaid mobile phone card. The retail store's receipts showed that a mobile phone, prepaid mobile phone card, socks, underwear, gloves, and a shirt had been purchased together on November 7, 2016, using a credit card in the name of B.B.

B.B. testified as a witness and denied purchasing the prepaid mobile phone card on November 7, 2016. When shown a copy of the credit card used for the purchase, B.B. denied ever applying for, possessing, or using the card. However, B.B. acknowledged he had previously given defendant a copy of his social security card and identification card because he wanted defendant to "help [him] build [his] credit." B.B. was not aware that defendant used a phone registered in B.B.'s name.

7. Evidence Found in Defendant's Possession

An investigator with the Riverside County District Attorney's Office testified he inventoried the items in defendant's possession at the time of defendant's detention and subsequent arrest. Within defendant's wallet, investigators located, among other things,

(1) a driver's license with Burniston's identifying information but bearing defendant's picture; (2) three credit cards in the name of B.B.; (3) one credit card in the name of Burniston; and (4) a credit card in the name of B.C.[11] One of the credit cards in B.B.'s name was the same card used to purchase the prepaid phone card and phone from the retailer.

The phone in defendant's possession at the time of his arrest contained, among other images, photographs of Burniston's driver's license, social security card, and a debit card in Burniston's name; photographs of B.C.'s driver's license and social security card; photographs of B.B.'s driver's license and social security card; and a photograph of five firearms lying across the bed in defendant's residence. Additionally, defendant's phone stored a video depicting defendant displaying and discussing the various firearms in his possession, including two different firearms that used nine-millimeter ammunition.

The investigator also testified that while cellular phone tower records indicated defendant's phone had been shut off at the time of Burniston's killing, the data on defendant's phone continued to keep track of its location using the phone's GPS system. The location data indicated that in the early morning of November 11, 2016, defendant's phone had physically been at the crime scene around the same time as Burniston's phone and the prepaid mobile phone.

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[11] The investigator merely confirmed that the items documented in exhibit 167 were located on defendant's person at the time of his arrest. The specific items documented in exhibit 167 had been previously detailed in another witness's testimony.

Finally, the data records from defendant's phone showed that it was used on multiple occasions on November 11, 2016, to conduct Internet searches regarding the discovery of a body in Corona.[12] Cellular phone tower data also showed that during this time period, the phone traveled from defendant's residence to the location of the crime scene before traveling back toward Riverside.

8. Evidence Recovered from Defendant's Residence

An investigator with the Riverside County District Attorney's Office testified that during the course of their investigation, all of the firearms depicted in the video and the photograph on defendant's phone were recovered, except for the smallest nine-millimeter firearm. Based upon a forensic analysis, the one nine-millimeter firearm that was recovered was not used in connection with Burniston's shooting. While searching defendant's home, investigators also discovered ammunition that matched the brand and color of the shell casings located near Burniston's body.

9. Defendant's Testimony

Defendant elected to testify in his own defense. Defendant acknowledged that he and Burniston had a business relationship, describing Burniston as a "silent investor" who contributed his "creditworthiness" for the purpose of providing credit repair

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[12] Specifically, at 7:10 a.m., on November 11, 2016, defendant's phone was used to conduct an Internet search of the terms, " 'Corona News' "; was used again at 7:12 a.m. to conduct an Internet search of the terms, " 'Corona, California News, body found' "; and was used again at 7:39 a.m., to conduct an Internet search of the terms, " 'can prepaid phone be traced.' " The phone was used later that afternoon to again search for the terms, " 'Corona, California News body found' " and " 'Corona, California News, body found today.' "

services. Defendant stated all of the credit cards he had in his possession were given to him by the identified owners, and all of the individuals who provided him with their personal identifying information did so with full knowledge of what he intended to do with that information. Defendant also acknowledged that he hired B.C. as a personal assistant.

According to defendant, he was out with a girlfriend, L., on the evening of November 10, 2016, and dropped her off at her home around 5:00 or 6:00 p.m. He intended to go to a car meet later that evening with members of his car club but missed the prearranged meeting time, so he instead decided to visit a different girlfriend's home. Defendant admitted that he briefly returned to his residence that evening to meet B.C., but he stated that the purpose of doing so was to allow B.C. to borrow one of defendant's cars. At some point while he was at home, defendant misplaced his phone, and he returned to S.'s home without it.

According to defendant, he returned to his residence the morning of November 11, 2016, and discovered B.C. in the living room. B.C. then confessed to defendant that he and a friend went to meet Burniston the previous night; the purpose of the meeting was to purchase marijuana; there was some disagreement about the cost; and the friend eventually shot Burniston. Defendant explained that he owned five firearms, including two nine-millimeter pistols; B.C. had a key to defendant's home and knew where the firearms were stored; and B.C. confessed to taking one of defendant's firearms to the meeting with Burniston.

B.C. told defendant he did not see the actual shots and thus did not know if Burniston was killed. As a result, defendant used his phone to conduct Internet searches to see if a murder had been reported in the news. Defendant also admitted purchasing a mobile phone and prepaid mobile phone card sometime during the week prior to Burniston's death, but he claimed that he gave the phone to B.C. the day it was purchased.

Defendant admitted, both on direct examination and during cross-examination, that he did not disclose B.C.'s confession prior to trial.

C. *Verdict and Sentence*

The jury found defendant guilty of murder (§ 187, subd. (a), count 1) and also found true the allegations that defendant was lying in wait and personally discharged a firearm causing death in the commission of the murder. The jury also returned guilty verdicts on the numerous other charges made against defendant.

Defendant was sentenced to life imprisonment without the possibility of parole for the murder conviction in count 1; a consecutive indeterminate term of 25 years to life in state prison for the personal discharge of a firearm; and a consecutive determinate term of 21 years four months for the other charges.

III. DISCUSSION

A. *Defendant's Claim of* Doyle *Error Does Not Warrant Reversal*

On appeal, defendant argues the prosecutor's questioning during cross-examination regarding his failure to disclose B.C.'s purported confession prior to trial was an impermissible use of his silence in violation of his constitutional rights, as set

forth in *Doyle*. We conclude the claim has been forfeited for failure to raise a timely objection in the proceedings below. We further conclude that even in the absence of forfeiture, the prosecutor's cross-examination did not constitute error under *Doyle*. Finally, we conclude that even assuming *Doyle* error occurred, defendant has not established prejudice warranting reversal.

1. Relevant Background

During the direct examination of defendant, defendant testified that B.C. made a confession regarding the murder of Burniston that differed substantially from B.C.'s trial testimony. Defendant then acknowledged that when he was first interviewed by the police, he did not disclose B.C.'s confession. However, defendant explained that he did not do so because he believed B.C. was innocent and did not want to implicate B.C. in Burniston's death. Defendant claimed that he would not have made the same decision had he known B.C. would accuse him of killing Burniston; he accused B.C. of lying when providing preliminary hearing and trial testimony; and he further expressed the belief that B.C. had "tricked" defendant into not disclosing the truth earlier. Defendant adamantly claimed that, had he known B.C. would lie, he "would have made the decision . . . [to] just call[] the cops [him]self. . . . [¶] Before [he] even was arrested. This would have been something that [he] would have just made a decision on [his] own . . . ."

On cross-examination, the prosecutor questioned defendant regarding multiple inconsistencies between his trial testimony and the version of events he had provided to the police when he was initially detained and interviewed, including defendant's failure

to disclose B.C.'s purported confession. Defendant did not object to this line of questioning.

Defendant was then asked when he first learned that B.C. had accused defendant of Burniston's murder and why he failed to disclose B.C.'s purported confession to the police or the district attorney's office even after he discovered B.C.'s accusations. Defendant objected to this line of questioning on the ground it would invade attorney-client privilege and, as a result, the trial court admonished the prosecutor to tailor any questions to avoid asking about the substance of any communication between defendant and his attorney. Near the end of the prosecutor's cross-examination, the prosecutor again asked, "And you waited until almost the last week of trial to give your version of [B.C.'s] confession?" In response, defense counsel stated: "Same objection, . . . she's asking the same question. . . . I move for a mistrial." The trial court denied the request for a mistrial and admonished the prosecutor to move onto another area of inquiry; the prosecutor concluded her cross-examination shortly thereafter.

On redirect, defense counsel elicited further testimony regarding defendant's previous failure to disclose B.C.'s confession. Defendant reaffirmed that if he had known B.C. would accuse defendant of Burniston's killing, defendant would have called the police himself "without a doubt." Defendant further stated he would have disclosed B.C.'s confession during his interview with the police "without a doubt."

Defendant's testimony concluded, the defense rested its case, and the jury was released for the day. After a lengthy discussion between counsel and the trial court regarding admission of exhibits, defense counsel stated: "I wanted to add something

briefly to the record. There was some . . . objections that I was making prior to the lunch break, concerning my client's privileged communications with his attorneys. I just wanted to add I believe that's going to be pursuant to the Fifth and Sixth Amendments to the U.S. Constitution as well as just his right to a fair trial as pursuant to the U.S. Constitution. I just wanted to add that for the record."

On the day of sentencing, defendant moved for a new trial on the ground that the prosecutor's cross-examination constituted *Doyle* error in violation of his Fifth Amendment right to remain silent. The motion characterized the entirety of the prosecution's cross-examination regarding defendant's failure to disclose B.C.'s purported confession as error under *Doyle*, without distinguishing between any of the specific questions asked by the prosecutor. The trial court denied the motion, concluding that it was appropriate to question defendant on cross-examination regarding inconsistencies in his prior statements and actions.

2. General Legal Principles and Standard of Review

"In *Doyle*, the United States Supreme Court held the prosecution may not use a defendant's postarrest, post-*Miranda*[13] silence to impeach the defendant's trial testimony. [Citation.] . . . The court concluded such impeachment was fundamentally unfair and a deprivation of due process because *Miranda* warnings carry an implied assurance that silence will carry no penalty. [Citation.] . . . [¶] The California Supreme Court has extended the *Doyle* rule to prohibit the prosecution's use of a defendant's post-

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13 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Miranda silence as evidence of guilt during the prosecution's case-in-chief." (*People v. Bowman* (2011) 202 Cal.App.4th 353, 363.)

"Doyle error can occur either in questioning of witnesses or jury argument." (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256.) However, "[t]he United States Supreme Court has explained that a *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant's postarrest silence against him at trial, and an objection and appropriate instruction to the jury ordinarily ensures that the defendant's silence will not be used for an impermissible purpose." (*People v. Clark* (2011) 52 Cal.4th 856, 959.) Thus, while *Doyle* error may be premised upon a single improper question, there must also be a defense objection to the question that is erroneously overruled in order to constitute error. (*People v. Lewis*, at p. 256.)

Finally, even where *Doyle* error has occurred, such error must be prejudicial under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 to warrant reversal. (*People v. Thomas* (2012) 54 Cal.4th 908, 936-937.) Under this standard, "reversal is required unless the error was harmless beyond a reasonable doubt" (*People v. Hernandez* (2011) 51 Cal.4th 733, 744-745) or, stated alternatively, it must be "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Pearson* (2013) 56 Cal.4th 393, 463.)

3. Defendant's Claim Is Forfeited for Failure To Raise a Timely Objection Below

The California Supreme Court has repeatedly recognized that the failure to make a timely objection on *Doyle* grounds and failure to request a curative admonition constitutes forfeiture of any claim of *Doyle* error on appeal. (See *People v. Tate* (2010)

49 Cal.4th 635, 691-692; *People v. Collins* (2010) 49 Cal.4th 175, 202; *People v. Huggins* (2006) 38 Cal.4th 175, 198; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

As the People correctly note, the prosecutor's questions on cross-examination actually addressed two, distinct instances in which defendant failed to disclose B.C.'s purported confession: (1) defendant's failure to disclose during his prearrest interview with police, and (2) defendant's failure to disclose after learning of B.C.'s testimony at defendant's preliminary hearing. The record here shows that defendant did not raise any objections, let alone objections based upon *Doyle*, to the line of questioning involving his prearrest interview with police. Accordingly, any claim of *Doyle* error premised upon these questions has clearly been forfeited.

Further, while defendant did object to the handful of questions regarding his failure to disclose B.C.'s confession after learning of B.C.'s accusations, the only objection made was based upon attorney-client privilege. The California Supreme Court has concluded that an objection based upon attorney-client privilege does not preserve an objection based upon *Doyle* error for purposes of appeal. (*People v. Tate*, *supra*, 49 Cal.4th at pp. 691-692.) Thus, defendant's objection at the time of cross-examination was not sufficient to preserve any claim of *Doyle* error.

Defendant attempts to avoid this conclusion by highlighting the fact that defense counsel clarified his prior objections "before the parties left for the day."[14] However, "[a]n objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds . . . and revise the objection later . . . stating specific or different grounds." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 22.) Likewise, a contemporaneous objection and request for jury admonition is required to preserve a claim of prosecutorial misconduct based upon a prosecutor's comments before the jury. (*People v. Gamache* (2010) 48 Cal.4th 347, 371; see *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [The requirement that objections be timely raised applies to *Miranda*-based objections.].)

Here, defense counsel's clarification came only after defense counsel engaged in redirect examination eliciting testimony on the exact same topic, defendant's testimony had concluded, the defense rested its case, the jury was excused for the day, and the trial court conducted a conference on numerous other evidentiary matters. Waiting until this time to raise an objection deprived the trial court of the ability to immediately address any potential prejudice with a curative admonition and further deprived the prosecution of the ability to lay the foundation for potential exceptions to the extent any objection had

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[14] Defendant also represents that he requested a mistrial during the prosecutor's cross-examination, implying that such request was premised upon *Doyle* error. However, the record shows that the request for a mistrial was made following an objection based upon attorney-client privilege, and there was no mention of alleged constitutional error, let alone any specific mention of *Doyle* error.

merit. Thus, the objection was neither timely nor specific, and any claim of *Doyle* error has been forfeited for purposes of appeal.

4. Even in the Absence of Forfeiture, We Would Find No Error

While we have concluded defendant forfeited his claim, we also believe that, even in the absence of forfeiture, *Doyle* error did not occur in this case.

"The *Doyle* rule . . . is not absolute." (*People v. Bowman*, *supra*, 202 Cal.App.4th at p. 363.) It does not prohibit the prosecution's use of a defendant's silence in a variety of situations, including the use of a defendant's prearrest silence. (*Id.* at pp. 363-364; *Jenkins v. Anderson* (1980) 447 U.S. 231, 238 ["[T]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."]; *People v. Tom* (2014) 59 Cal.4th 1210, 1223 ["The prosecution may . . . use a defendant's prearrest silence in response to an officer's question as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege."].) Here, the record discloses that defendant submitted to an interview with police and discussed numerous topics related to Burniston's murder prior to defendant's assertion of his right to counsel and prior to his arrest.[15] Thus, as an initial matter, we agree with the People that the prosecution's cross-examination of defendant's failure to disclose B.C.'s purported confession at the time he actively engaged in a prearrest interview with police cannot be the basis of *Doyle* error.

[15] For example, defendant claimed that he never spoke with Burniston on the evening of the murder and did not own a second nine-millimeter firearm. After these exchanges, defendant requested an attorney and the police ended the interview.

It is true that later in defendant's interview, he asserted his right to counsel and the police ended the interview in response. However, "the exercise of [a defendant's] *Miranda* rights in the midst of his statement to the police does not erase the statement previously given. A fully voluntary statement to police followed by invocation of the right to remain silent does not render the voluntary statement somehow the less voluntary and thus inadmissible. . . . [A] deliberate omission in a voluntary statement to police is [not] tantamount to an exercise of the right to remain silent. The principle of . . . *Doyle* cannot be strained so far." (*People v. Clem* (1980) 104 Cal.App.3d 337, 344.) Thus, the fact that defendant eventually invoked his right to counsel and remained silent thereafter does not preclude the prosecutor from cross-examining defendant regarding inconsistent statements or selective silence prior to that time, and cross-examination on that subject does not constitute error under *Doyle*.

As the People correctly note, the prosecutor's questions regarding defendant's postarrest failure to disclose present a closer question. However, while the permissible use of postarrest silence is indeed more limited, "a prosecutor may refer to the defendant's postarrest silence in fair response to an exculpatory claim or in fair comment on the evidence without violating the defendant's due process rights." (*People v. Wang* (2020) 46 Cal.App.5th 1055, 1083.) As this court has previously explained: "[A]n assessment of whether the prosecutor made inappropriate use of a defendant's postarrest silence requires consideration of the context of the prosecutor's inquiry or argument," and "[a] violation of due process does not occur where the prosecutor's reference to defendant's postarrest silence constitutes a fair response to defendant's claim or a fair

comment on the evidence. [Citations.] . . . . '*Doyle*'s protection of the right to remain silent is a "shield," not a "sword" that can be used to "cut off the prosecution's 'fair response' to the evidence or argument of the defendant." ' " (*People v. Champion* (2005) 134 Cal.App.4th 1440, 1448.)

Thus, numerous courts, including this court, have found no error under *Doyle* where the prosecutor's questions or comments are a direct response to a theory or argument raised by a defendant. (See *People v. Champion*, *supra*, 134 Cal.App.4th at p. 1448 [" 'Questions or argument suggesting that the defendant did not have a fair opportunity to explain his innocence can open the door to evidence and comment on his silence.' "]; *People v. Wang*, *supra*, 46 Cal.App.5th at p. 1083 [no *Doyle* error where prosecutor's cross-examination was not designed to draw independent meaning from defendant's silence, but instead intended to correct the false impression defendant tried to create in direct testimony that he was fully cooperative with police]; *People v. Campbell* (2017) 12 Cal.App.5th 666, 672-673 [prosecutor may fairly question defendant on postarrest silence where a defendant testifies on the stand in an attempt to create an impression he fully cooperated with law enforcement]; *People v. Delgado* (2010) 181 Cal.App.4th 839, 852-854 [same]; *People v. Collins* (2010) 49 Cal.4th 175, 204 [A prosecutor's questions regarding a defendant's failure to come forward earlier with his alibi can be "a legitimate effort to elicit an explanation as to why, if the alibi were true, [the] defendant did not provide it earlier."].)

Here, defendant first raised the issue of his failure to previously disclose B.C.'s purported confession on direct examination, openly acknowledging his silence on the

issue in prior interactions with law enforcement; claiming he had been "tricked"; and further claiming that he would have been inclined to voluntarily report B.C.'s confession to police had he known B.C. would accuse him of Burniston's murder. Indeed, even after the prosecutor's allegedly improper cross-examination, defendant chose to draw attention to the issue again on redirect examination, repeatedly asserting that he would have disclosed B.C.'s confession to police "without a doubt."

Thus, in context, it is apparent that the brief portion of the prosecutor's cross-examination addressing defendant's postarrest silence was not an attempt to draw attention to that silence as substantive evidence of guilt, but a fair response to the assertions made by defendant on direct examination. Defendant himself voluntarily made his failure to disclose known to the jury and voluntarily offered an explanation for his failure to disclose during direct examination. Having done so, defendant cannot claim that the Fifth Amendment precludes the prosecution from cross-examining him on that very subject. Particularly in light of defendant's repeated assertions that he would have independently made the decision to reveal B.C.'s confession had he known of B.C.'s accusations, a question regarding why he failed to do so, even after learning of those accusations, was a logical and fair response. Where defendant himself has opened the door to a specific line of questioning involving his failure to make a disclosure following his arrest, the prosecutor's attempt to cross-examine defendant on that subject does not run afoul of *Doyle*.

5. Any Alleged *Doyle* Error Was Not Prejudicial

Finally, even if the issue had not been forfeited and, even assuming cross-examination regarding defendant's postarrest silence constituted *Doyle* error, we would find no prejudice warranting reversal.

First, *Doyle* error arising from the mention of a defendant's postarrest silence is not prejudicial where other instances of silence or inconsistent statements were also properly admitted for the same impeachment purpose. (*People v. Hinton* (2006) 37 Cal.4th 839, 867-868 [prosecutor's reference to defendant's postarrest silence in response to a police request for an interview was harmless in light of fact that defendant was also impeached with statements given during three other postarrest police interviews in which he waived his *Miranda* rights]; *People v. Earp* (1999) 20 Cal.4th 826, 857-858 [prosecutor's reference to postarrest silence was harmless where defendant was also impeached with inconsistent version of events he gave prior to invocation of his right to remain silent].)

As we have already explained, the prosecution's cross-examination regarding defendant's inconsistent statements and failure to disclose during a prearrest interview did not violate *Doyle* and was clearly admissible for the purpose of impeachment. Thus, defendant's prior failure to disclose was already properly before the jury for the purpose of impeaching his trial testimony. The prosecutor's brief cross-examination on defendant's postarrest silence served the same purpose; was merely cumulative of the more numerous questions regarding his prearrest silence; and, as such, was not prejudicial.

Second, the other evidence of defendant's guilt was overwhelming in this case. B.C. provided direct witness testimony that defendant committed the murder. Defendant's mobile phone contained location data revealing it was present at the location of Burniston's death at the time Burniston was killed, and it also contained Internet search data suggesting defendant had conducted numerous internet searches regarding the discovery of a body the day of Burniston's death. Defendant admitted that he purchased the prepaid mobile phone card that was used to contact Burniston in the hours leading up to Burniston's death. Video and photographic evidence, as well as defendant's own testimony, confirmed that defendant owned a firearm of the same type used to kill Burniston. A search of defendant's home also uncovered ammunition of the same type used to kill Burniston.

An analysis of defendant's financial operation revealed that Burniston was the second most important identity connected with defendant's network of financial accounts; text messages between Burniston and defendant suggested Burniston was becoming impatient with defendant's handling of various accounts bearing Burniston's name; and defendant had recently been made aware of a police investigation focused on a check that had been mailed to defendant and ultimately deposited into one of Burniston's accounts. In light of this overwhelming evidence connecting defendant to Burniston's murder, and the fact that the prosecutor did not even mention defendant's postarrest silence in her closing argument, we conclude that, even if *Doyle* error had occurred, any such error was harmless beyond a reasonable doubt.

B. *Admission of Uncharged Misconduct To Show Motive Was Not Erroneous*

Defendant also claims the trial court erred when it permitted a witness to testify that defendant had previously made a violent threat following a dispute over money. Specifically, defendant argues there was an insufficient nexus or link between the prior threat of violence and the charged offense to render the evidence admissible to establish motive.[16] We find no error warranting reversal on this ground.

1. Relevant Background

At the beginning of trial, defendant requested the trial court determine the relevance and admissibility of testimony by H.G. outside the presence of a jury pursuant to Evidence Code section 402, and the trial court requested an offer of proof from the prosecution. In response, the People argued H.G.'s testimony would be relevant to show identity, a common plan or scheme with respect to the various financial crimes charged, and motive with respect to the murder charge. With respect to motive, the prosecution specifically detailed that H.G. would testify that defendant verbally threatened her with violence when she withdrew money from one of their joint accounts without his permission. The trial court concluded that H.G.'s testimony was relevant to show intent, common scheme, design, or plan with respect to the financial crimes charged. The trial court also ruled the testimony of a prior threat would be admitted for the purpose of showing motive, explaining that "[t]he threat of violence to her in—with respect to a

[16] We note that defendant also discussed potential error in the admission of this witness's testimony for purposes of showing intent or a common plan or design, but ultimately concludes that only the testimony of a prior threat was prejudicial.

dispute over money is relevance of intent in the current charges," based upon the representation that the People intended to prove defendant had a financial motive for killing Burniston.

Ultimately, H.G. testified that she first met defendant in the spring of 2016, the two began a dating relationship, and she eventually opened a shared business account with defendant when he offered to financially help her. H.G. had access to this account and observed funds being transferred into and out of the account, but she did not know the source of the funds or the purpose of the transfers. H.G. eventually learned that defendant was in a relationship with another woman and, in response, withdrew all of the money from the account. When defendant discovered what H.G. had done, he called H.G. and threatened her. Defendant stated the amount of money H.G. took was not enough to justify killing her, but it might justify setting fire to her parents' home. H.G. returned the money to the business account that same day.

2. General Legal Principles and Standard of Review

"The admission of evidence of prior conduct is controlled by Evidence Code section 1101. Subdivision (a) of that section provides . . . : 'Evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, *or evidence of specific instances of his or her conduct*) is inadmissible when offered to prove his or her conduct on a specified occasion.' " (*People v. Thompson* (2016) 1 Cal.5th 1043, 1113-1114.) " 'Evidence of [prior uncharged acts] is admissible, however, when relevant for a noncharacter purpose—that is, when it is relevant to prove some fact other than the defendant's criminal disposition, such as 'motive, opportunity,

intent, preparation, plan, knowledge, identity, absence of mistake [of fact] or accident.' " (*People v. Winkler* (2020) 56 Cal.App.5th 1102, 1143.)

Even when relevant for a noncharacter purpose, evidence of a prior uncharged act may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Winkler*, *supra*, 56 Cal.App.5th at p. 1143.) Thus, when considering whether such evidence is admissible, the trial court must balance three factors: (1) the materiality of the facts to be proved; (2) the probative value, or the tendency of the uncharged crimes to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence such as prejudicial effect or other section 352 concerns. (*Ibid.*) The trial court's evidentiary ruling on this issue is reviewed for abuse of discretion. (*Id.* at p. 1144; *People v. Thompson*, *supra*, 1 Cal.5th at p. 1114.)

3. Application

Here, the trial court held that H.G.'s testimony regarding defendant's prior threat of violence in response to a financial dispute was relevant to the issue of motive. Evidence of prior conduct is admissible for the purpose of establishing motive where the uncharged act and the charged act " '*are explainable as a result of the same motive*.' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381.) Such evidence is admissible so long as "there is 'sufficient evidence for the jury to find defendant committed both sets of acts, and sufficient similarities to demonstrate that in each instance the perpetrator acted

with the same intent or motive.' " (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 827.)

Here, with respect to both the charged conduct and uncharged conduct, defendant was involved in some form of business relationship with the victim, had access to an account in the victim's name, exercised control of the finances within that account, and responded with violence when challenged with respect to his control over management of those finances. These similarities were sufficient for a jury to reasonably infer that defendant had the same motive with respect to making his threat of violence to H.G. and killing Burniston. Moreover, the portion of H.G.'s testimony regarding defendant's threat was brief, and the threat of violence testified to by H.G. was far less egregious than the act of killing Burniston. Thus, other factors that might have justified exclusion of the testimony pursuant to Evidence Code section 352, notwithstanding its relevance to the prosecution's theory of the case, were simply not present.

Defendant claims there was an insufficient similarity to justify admission of H.G.'s testimony under Evidence Code section 1101, subdivision (b). However, the least degree of similarity between the uncharged act and the charged offense is required in order to prove motive and intent. (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 827.) In such a case, the similarities need only "provide[] a sufficient basis for the jury to conclude that defendant[] acted with the same criminal intent or motive, rather than by ' "accident or inadvertence or self-defense or good faith or other innocent mental state." ' " (*Ibid.*; see *People v. Pertsoni* (1985) 172 Cal.App.3d 369, 374 [lack of similarity may be irrelevant where "the mere *fact* of the prior offense gives rise to an

inference of motive"].) As we have already explained, the prior threat and the charged offense in this case bore at least some similarity with respect to the characteristics of the victim in relation to defendant. At the very least, the similarities were sufficient to permit the jury to reasonably infer defendant did not act with an "innocent mental state," which is all that is necessary to support admission for the purpose of showing intent or motive.

4. Even if Erroneous Admission of H.G.'s Testimony Was Not Prejudicial

Finally, even assuming the brief testimony regarding defendant's prior threat of violence to H.G. was erroneously admitted, any such error was harmless. "[W]here . . . independent and competent evidence to substantially the same effect from other witnesses is placed before the jury[,] the erroneous admission of such cumulative evidence is ordinarily not prejudicial." (*Kalfus v. Fraze* (1955) 136 Cal.App.2d 415, 423; see *People v. Smithey* (1999) 20 Cal.4th 936, 972-973 [admission of testimony over defendant's objection harmless where such testimony cumulative of other testimony already in record]; *People v. Houston* (2005) 130 Cal.App.4th 279, 300 [no prejudice where objectionable testimony cumulative of other evidence unchallenged by appellant].)

Here, B.C. offered testimony to substantially the same effect as H.G.'s testimony regarding defendant's threat of violence in response to a financial dispute. Specifically, B.C. testified of a conversation in which defendant expressed interest in hiring someone to kill a woman who shared a joint account with defendant because the woman had taken money from the joint account. Defendant did not object to the admission of this testimony and does not claim admission of this testimony was erroneous on appeal. Because essentially the same testimony was presented to the jury by a different witness,

we cannot conclude that H.G.'s testimony accusing defendant of making a violent threat in response to a nearly identical set of actions was prejudicial, even if erroneously admitted.

C. *Exclusion of Third Party Culpability Evidence*

Defendant also broadly argues that the trial court erroneously excluded evidence of third party culpability. We conclude this claim of error has been forfeited for failure to preserve an adequate record for appellate review and further conclude that, even in the absence of forfeiture, the trial court did not abuse its discretion.

1. Relevant Background

Early in the trial, during the cross-examination of a witness, defense counsel disclosed defendant's intent to potentially pursue a theory of defense based upon third party culpability. Over the prosecutor's objections, the trial court permitted defense counsel to complete his intended questions with respect to cross-examination of that witness. However, at the conclusion of witness testimony for the day, the trial court informed defense counsel that the admissibility of any evidence of third party culpability should be addressed in limine outside the presence of the jury. In response, defense counsel disclosed that he was considering pursuing a theory that "either [B.C.] and one or more of his cohorts is responsible for this."

The trial court ordered briefing on the issue, indicated its intent to set a hearing pursuant to Evidence Code section 402 to consider the admissibility of any such evidence, and instructed defense counsel not to inquire about third party culpability until after the trial court could rule on the admissibility of any specific evidence at such a

hearing. Specifically, the trial court advised defense counsel that: "I'm going to expect that you'll provide an offer of proof, offers of proof and specify specific examples of evidence that you anticipate you'll be presenting in support of your third party culpability argument that's going to be important because without that, I'll be left with merely argument, and so I need to know with some precision, [what] you believe the evidence is that supports such an argument."

After reviewing the briefs submitted by both parties on the issue of third party culpability,[17] the trial court expressed that it was not inclined to rule on the issue solely based upon representations in the briefing and advised that it would set the matter for a full evidentiary hearing with witness testimony under oath pursuant to Evidence Code section 402. The trial court indicated it was important for it to hear the actual evidence being proposed in order to make preliminary determinations on admissibility. Defense counsel acknowledged that he was not objecting to the trial court's desire to conduct such an inquiry.

When the trial court called the matter for the anticipated evidentiary hearing, defense counsel represented he would not be calling any witnesses. In response, the trial court offered to reschedule the hearing to permit more time to arrange for appearances. Defense counsel declined this offer and indicated that most of his anticipated evidence of third party culpability would be presented during the cross-examination of B.C. However, the trial court cautioned that even if defendant intended to utilize witnesses that

[17] Both parties submitted briefs on the admissibility of third party culpability evidence. However, neither brief has been made part of the record on appeal.

were already identified, the trial court still needed to hear the potential testimony outside the presence of the jury to make an initial determination of its admissibility.

The trial court repeatedly represented that it would permit defense counsel as much time as needed to arrange for any necessary witness to appear and testify in a hearing pursuant to Evidence Code section 402. The trial court also indicated that, to the extent defense counsel was concerned about divulging any of defendant's own testimony in advance, the trial court would be amenable to holding an evidentiary hearing after defendant's testimony and permitting the defense to recall any witness to testify on the issue of third party culpability, should such evidence be deemed admissible following the hearing.

Specifically, with respect to B.C.'s testimony, the trial court indicated it would schedule a hearing for B.C. to testify under oath regarding any inquiry potentially related to third party culpability. However, when defense counsel was subsequently asked when he would like to conduct that hearing, counsel represented that a hearing would no longer be necessary.

Several days later, the trial court asked defense counsel to confirm that defendant was declining the opportunity to conduct an Evidence Code section 402 hearing on the admissibility of third party culpability evidence. In response, defense counsel indicated that a hearing might be required, but that he was still investigating some information related to the matter and asked that a hearing be put off until such time as the defense completed its investigation. The trial court indicated it would be open to conducting a

hearing as soon as defense counsel believed he was ready, but that until such time, no evidence of third party culpability would be permitted.

During the cross-examination of B.C., the trial court was asked to resolve various objections to questions that potentially implicated third party culpability in violation of the trial court's prior order. In response, the trial court inquired why defense counsel had still not accepted the invitation to first present any anticipated testimony on the issue in an Evidence Code section 402 hearing, and defense counsel indicated his decision was based upon "strategic reasons." The trial court again advised that defense counsel should refrain from pursuing any questioning regarding third party culpability absent a hearing, but noted that B.C. could be subject to recall to testify on that subject after defendant had testified. However, following defendant's testimony, the defense rested its case and declined to recall any witnesses.

2. General Legal Principles and Standard of Review

"Like all other evidence, third party culpability evidence may be admitted if it is relevant and its probative value is not substantially outweighed by the risk of undue delay, prejudice, or confusion, or otherwise made inadmissible by the rules of evidence. [Citations.] 'To be admissible, the third party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.' " (*People v. Turner* (2020) 10 Cal.5th 786, 816.) " '[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not

suffice to raise a reasonable doubt about a defendant's guilt . . . .' [Citation.] Moreover, admissible evidence of this nature points to the culpability of a *specific* third party, not the possibility that some unidentified third party could have committed the crime. [Citations.] For the evidence to be relevant and admissible, 'there must be *direct or circumstantial evidence linking the third person to the actual perpetration of the crime*.' [Citation.] As with all evidentiary rulings, the exclusion of third party evidence is reviewed for abuse of discretion." (*Id.* at pp. 816-817.)

3. Defendant's Refusal to Participate in an Evidence Code Section 402 Hearing Renders the Record Inadequate To Review His Claim of Error

The People contend that defendant's claim of error has been forfeited because defendant "withdrew" his request to present such evidence. Defendant disagrees, arguing that his counsel did not withdraw his request to present evidence of third party culpability but merely refused to participate in an evidentiary hearing pursuant to Evidence Code section 402 when offered the opportunity to do so by the trial court. Regardless of whether defendant's actions can properly be characterized as a "withdrawal" of a request to present third party culpability evidence, the fact that defendant declined to participate in a hearing pursuant to Evidence Code section 402 renders the record inadequate for review of his claim of error on appeal.

A judgment may not be reversed based upon the erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a).) Thus, "[w]hen a trial court denies a defendant's request to

produce evidence, the defendant must make an offer of proof in order to preserve the issue for consideration on appeal." (*People v. Foss* (2007) 155 Cal.App.4th 113, 126.) " ' " ' Before an appellate court can knowledgeably rule upon an evidentiary issue presented, it must have an adequate record before it to determine if an error was made.' [Citation.]" "The offer of proof exists for the benefit of the appellate court . . . [and] serves to inform the appellate court of the nature of the evidence that the trial court refused to receive in evidence. . . . The function of an offer of proof is to lay an adequate record for appellate review. . . ." ' " (*Id.* at p. 127.)

Here, the record shows that defendant repeatedly declined the trial court's invitation to participate in a hearing pursuant to Evidence Code section 402. As a result, the record on appeal does not contain any indication of what evidence or testimony defendant believed constituted admissible evidence of third party culpability. Notably, other than broadly stating that the trial court excluded evidence of third party culpability, defendant's briefs on appeal fail to identify the specific testimony or other evidence that would have been introduced but for the trial court's purported exclusion. Absent any indication of what evidence, if any, was actually excluded, the record is inadequate for this court to determine the merits of defendant's claim on appeal, and the issue must be resolved against defendant.

Defendant appears to suggest this court can determine the admissibility of third party culpability evidence based upon inferences drawn from the testimony that was permitted or the questions defendant was not permitted to ask on cross-examination. However, "[e]ven if a question . . . is posed on cross-examination and the trial court

prevents the defense from delving into the issue, the defendant must still make an offer of proof to preserve the issue for consideration on appeal, unless the issue was within the scope of the direct examination. . . . If the evidence the defendant seeks to elicit on cross-examination is not within the scope of the direct examination, an offer of proof is required to preserve the issue." (*People v. Foss*, *supra*, 155 Cal.App.4th at p. 127.) Absent any indication of a witness's answer that may have been to any specific question, this court cannot simply speculate what evidence might have been adduced. Thus, we conclude this claim of error has been forfeited for failure to present an adequate record for review.

4. Even in the Absence of Forfeiture, We Would Find No Abuse of Discretion

Even in the absence of forfeiture, the record actually before us does not disclose an abuse of discretion. Here, the trial court did not exclude any third party culpability evidence based upon a substantive analysis of its relevance or potential prejudice. Instead, the trial court conditioned the introduction of any such evidence upon its presentation in a hearing pursuant to Evidence Code section 402 for the purpose of permitting the trial court to make a preliminary determination of its admissibility.

"In determining the admissibility of evidence, the trial court has broad discretion," and "it is within the court's discretion whether or not to decide admissibility questions under [Evidence Code section 402, subdivision (b),] within the jury's presence." (*People v. Williams* (1997) 16 Cal.4th 153, 196.) The trial court's selection of a statutorily authorized procedure in order to make a preliminary determination of the admissibility of evidence is not arbitrary, capricious, or outside the bounds of reason. Defendant has

cited no authority for the proposition that the circumstances of this case restrained or otherwise limited the trial court's discretion in selecting such a procedure to resolve preliminary questions of admissibility. The trial court's decision here did nothing more than apply ordinary rules of procedure and evidence, and it was clearly within its broad discretion.

We disagree with defendant's contention that the trial court's decision to require a hearing pursuant to Evidence Code section 402 prior to the introduction of any evidence of third party culpability violated his constitutional rights. While "[a]ll defendants have the constitutional right to present a defense. [Citation.] That right does not encompass the ability to present evidence unfettered by evidentiary rules. [Citation.] Indeed, application of the ordinary rules of evidence does not impermissibly infringe on a defendant's right to present a defense." (*People v. Thomas* (2021) 63 Cal.App.5th 612, 627; see *People v. Mincey* (1992) 2 Cal.4th 408, 440.)

Moreover, the record in this case clearly shows the trial court afforded defendant every opportunity to lay the foundation for the admission of any third party culpability evidence, offering to conduct a hearing at anytime during the lengthy trial, offering to accommodate the schedule of any necessary witness, and offering to permit defendant to recall any witness who had already testified, should evidence of third party culpability be deemed admissible. Indeed, the trial court even offered to wait until after defendant's testimony to conduct the hearing to avoid giving the prosecution any unfair advantage. Having failed to avail himself of these opportunities, defendant's claim that his trial was

fundamentally unfair because he was prevented from presenting evidence of third party culpability is without merit.

D. *The Cumulative Error Doctrine Does Not Apply*

Defendant also claims the cumulative impact of errors identified on appeal requires reversal even if any individual error was not sufficiently prejudicial to independently warrant reversal. Under the cumulative error doctrine, "the cumulative effect of several trial errors may be prejudicial even if they would not be prejudicial when considered individually." (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1019.) However, since we have rejected each of defendant's individual claims of error, there are no errors to cumulate, and the cumulative error doctrine is not applicable.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

McKINSTER
Acting P. J.

MENETREZ
J.